FILED
NOV 21 1993
OFFICE OF THE CLERK

No. 93-744 (3)

In The

Supreme Court of the United States

October Term, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

GREENWICH COLLIERIES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT GREENWICH COLLIERIES IN OPPOSITION

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QUESTIONS PRESENTED

1. Does section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), authorize the U.S. Department of Labor's administrative law judges ("ALJ") to find facts in favor of certain classes of parties, based solely upon the identity of the party, even if the fact is not, in the ALJ's opinion, supported by the weight of the evidence, *i.e.*, a preponderance, but the evidence pro and con is roughly equal?

2. If section 7(c) of the Administrative Procedure Act compels an ALJ to find only facts that are supported by the weight of the evidence, has Congress expressly superseded the requirements of section 7(c) in the Black Lung Benefits Act and the Longshore and Harbor-workers' Compensation Act, in compliance with the rule against supersedure contained in section 12 of the Administrative Procedure Act, 5 U.S.C. § 559?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Andrew Ondecko ("Ondecko") is a claimant for benefits under the Black Lung Benefits Act. Petitioner below and now Respondent, Greenwich Collieries, is a wholly owned subsidiary of the Pennsylvania Mines Corporation. The Petitioner, Director, Office of Workers' Compensation Programs, United States Department of Labor, is the administrator of the Black Lung Program and is a statutory party in all black lung claims. 30 U.S.C. § 932(k).

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BRIEF OF RESPONDENT GREENWICH COLLIERIES IN OPPOSITION

Respondent Greenwich Collieries respectfully opposes the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit. Greenwich acknowledges, however, that disagreements among several courts of appeals over the meaning of key provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, governing on-the-record adjudications before dozens of federal boards and agencies warrant the attention of this Court.

STATEMENT OF THE CASE

A. In 1987, this Court held that a claimant for benefits under the Black Lung Benefits Act,[1] may utilize a very powerful presumption called the "interim presumption" if the claimant establishes a fact that invokes the presumption by a preponderance of the evidence. *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 159 (1987). In petitioning the case to this Court, the Mullins Coal Company argued that the application of a preponderance standard is compelled by the plain language of the regulation, as well as by section 7(c) of the Administrative Procedure Act ("APA"). 5 U.S.C. § 556(d). The APA argument was based, in part, on this Court's decision in *Steadman v. SEC*, 450 U.S. 91 (1981). In *Mullins*, this Court agreed that the plain language of the regulation establishing the interim presumption embodied a traditional preponderance-of-the-evidence standard of proof, and did not, for this reason, reach the APA question. *Mullins Coal*, 484 U.S. at 161 n.35.

In briefing this question, the Department of Labor ("DOL") agreed that section 7(c) applied in black lung

[1] Part C of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, and as further amended by the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981, 95 Stat. 1635, Consolidated Omnibus Budget Reconciliation Act of 1985, 100 Stat. 312, 313 (1986), Omnibus Budget Reconciliation Act of 1987, 101 Stat. 1330 (1987) (hereinafter referred to as the "BLBA").

claims, but noted that it was applied "as modified by a 'true doubt' rule." Brief for the Federal Respondent at 34, *Mullins Coal*, 484 U.S. 135 (No. 86-327). Under the true doubt rule, "close calls go to the claimant." *Id.* at 33. This Court noted DOL's advocacy of a true doubt rule, but did not expressly approve or disapprove the rule. *Mullins Coal*, 484 U.S. at 144 n.12.[2] As dissenting Justice Marshall suggested, the rule was not frequently used. *See id.* 484 U.S. at 163 n.2 (Marshall J. dissenting). This was true while the interim presumption and other very generous statutory presumptions and rules of proof applied.

In 1980, DOL repealed the interim presumption for new claims, having been instructed to do so by Congress in 1978. In 1981, after concluding that the black lung program was excessively generous and had outstripped reasonable attempts at benefit funding as a result of over-inclusive benefit criteria, Congress repealed many of the Act's statutory presumptions and rules of proof designed to give claimants a special advantage in adjudications. Black Lung Benefits Revenue Act of 1981 and Black Lung Benefits Amendments of 1981, Pub. L. 97-119, 95 Stat. 1635, §§ 201-04 (1981). *See Compton v. Inland Steel Co.*, 933 F.2d 477, 484-90 (7th Cir. 1991) (Coffey J. concurring). Under the new law, most claimants are required to prove their eligibility by competent evidence. *See e.g., Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990);

[2] It may be argued that the rule was expressly disapproved in the Court's adoption of a preponderance standard.

Adams v. Director, Office of Workers' Compensation Programs, 886 F.2d 818, 820 (6th Cir. 1989); *Campbell v. Director, Office of Workers' Compensation Programs*, 846 F.2d 502, 503 (8th Cir. 1988).

By the late 1980s, some ALJs often employed the true doubt rule to resolve evidentiary conflicts or merely to excuse themselves from conducting a careful review of the evidence. Use of the rule is not compelled by the Act, any regulation or judicial decision and ALJs treat it as an optional decisional device. The Department of Labor's Benefits Review Board, which conducts the appellate review of ALJs' decisions, has not held that an ALJ must employ the true doubt rule and generally allows ALJs to use the true doubt rule or the preponderance standard at the ALJs' election. Because the rule has no concrete source and its jurisprudence is ad hoc, the applicability of the rule in any case has always been unpredictable, depending more on the identity of the ALJ than on the characteristics of the proof in the record.

As the rule was applied more frequently following repeal of statutory proof enhancements, challenges to the validity of the rule increased. The rule is not the product of congressional deliberation or even the give and take of the regulatory process. For claim defendants, it seemed that the rule was employed solely for the purpose of rejecting otherwise persuasive, if not compelling, evidence. It is self-evident that a claimant who proves his or her case by evidence has no need for a true doubt rule. Judge Easterbrook is correct in observing that the rule's purpose seems to be to "re-create" the repealed presumptions and rules possibly "overriding the contrary judgment of Congress." *Freeman United Coal Mining Co. v.*

Office of Workers' Compensation Programs, 999 F.2d 291, 293 (7th Cir. 1993) (statement of Easterbrook J. respecting the suggestion for reh. en banc).

B. Andrew Ondecko filed a claim for black lung benefits on January 31, 1989. The claim was properly adjudicated under DOL's permanent eligibility rules adopted following repeal of the interim presumption. 20 C.F.R. Part 718 (1993). DOL administratively denied the claim and a hearing before an ALJ was requested. On August 3, 1990, ALJ Joan Huddy Rosenzweig awarded benefits. The ALJ found that Ondecko suffered from pneumoconiosis by applying true doubt to a factual record containing one qualified physician's opinion that Ondecko's x-rays showed pneumoconiosis and the opinions of eight qualified readers that the chest x-rays were negative for the disease. App. 41a. The ALJ also determined that Ondecko was totally disabled due to the disease by applying true doubt to a record containing a family doctor's opinion that Ondecko was so disabled and the opinions of four highly qualified specialists to the contrary. App. 44a. Greenwich appealed to the Benefits Review Board and there argued that the true doubt rule was inappropriately applied because the proof was not equal[3] and that the rule was, also, an unauthorized

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[3] Greenwich continues in its belief that the evidence in this case is far from equal, and that the ALJ's finding to the contrary is not supported by substantial evidence or an accurate, reasoned review of the record. The true doubt rule is so offensive to claim defendants because it is most often used in this fashion and not to address irreconcilable evidence. Greenwich expressly preserves its right to further challenge the ALJ's weighing of the evidence.

supersedure of the APA-mandated preponderance-of-the-evidence standard. The Board affirmed, holding that the rule is valid and that the Board would not disturb the ALJ's weighing of the evidence. App. 20a, 21a.

The United States Court of Appeals for the Third Circuit reversed. App. 2a. The Court found that DOL's regulations assigning to claimants the burden of "proving" facts alleged, coupled with section 7(c) of the APA foreclose a result in which employers are assigned the burden of disproving entitlement facts in a black lung claim. In construing section 7(c), the Third Circuit relies on this Court's holding in *Steadman v. SEC*, 450 U.S. 91, interpreting the third sentence in section 7(c) to prohibit an ALJ from finding a fact unless the finding is supported by a preponderance of the reliable and probative evidence in the record. App. 12a-13a.

The Third Circuit observes that the true doubt rule impermissibly excuses the claimant from proving the facts needed to support an award. The award made by the ALJ was, therefore, vacated and the case was remanded for a determination of whether the evidence supporting an award preponderated. App. 16a. Rehearing was denied, en banc. App. 48a.

C. The Black Lung Act contains no procedures of its own for the adjudication of claims filed with DOL. For this purpose, the Black Lung Act incorporates by reference the adjudicatory provisions of the Longshore and Harborworkers' Compensation Act. 33 U.S.C. §§ 901-952 ("LHWCA"), *incorporated in parts by reference into* 30 U.S.C. § 932(a). The LHWCA provides: "Notwithstanding any other provisions of this chapter, any hearing held

under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5." 33 U.S.C. § 919(d).

On the same day that Ondecko's case was argued to the Third Circuit, the panel also heard argument in a Longshore claim filed on behalf of Michael Santoro. Here too, the ALJ resolved conflicts in the evidence by application of the true doubt rule, and the Third Circuit vacated and remanded for a review of the record under a preponderance standard. The Third Circuit's decision in Santoro's case differs from its decision in *Ondecko* in its complete reliance on section 7(c), and in particular on the third sentence of that paragraph. *Maher Terminals, Inc. v. Director, Office of Workers' Compensation Programs*, 997 F.2d 1277, 1282-85 (3d Cir. 1993). DOL also has asked this Court to review the decision in *Maher*.

Greenwich Collieries believes that the analysis in *Maher* is correct, and that the Third Circuit's partial reliance in *Ondecko* on DOL's regulations purporting to assign a burden of persuasion to claimants in the traditional way, is unnecessary. When the framers of the APA set out to adopt uniform standards for administrative adjudication, an important purpose was to control the way agencies evaluated proof and reached findings of fact. *See* Sen. Comm. on the Judiciary, *Legislative History, the Administrative Procedure Act*, 79th Cong., 2d Sess. 185, 208, 210, 321, 365 (1946) (*"Legislative History"*). Congress intended these features of administrative adjudication to parallel the traditional standards applied in the courts. *Steadman*, 450 U.S. at 101 (*quoting* S. Rep. No. 248, 79th Cong., 2d Sess. 365 (1946)). Congress did not leave room for agency corrections or deviations for any reason. "[I]t

will be the duty of the reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection. . . . " 92 Cong. Rec. 2148, 2159 (statement of Sen. McCarran). "Implied amendments [to the APA] shall be precluded." *Legislative History, supra* p. 7 at 43.[4] *See also Professional Reactor Operator Society v. U.S. Nuclear Regulatory Commission*, 939 F.2d 1047, 1052 (D.C. Cir. 1991).

The APA does not contemplate the allocation of burdens or standards of proof with an eye toward the identity of the party the proof favors. The third sentence of section 7(c) of the APA, in light of *Steadman*, most naturally means that ALJs may not find facts unless the facts are proven by a preponderance. This is the instruction to the factfinder that is embodied in section 7(c) "concerning the degree of confidence society thinks he should have in the correctness of factual conclusions. . . . " *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (*quoting Addington v. Texas*, 441 U.S. 418, 423 (1979)). No agency's regulatory gloss is necessary, and no agency's supersedure is appropriate.

The Third Circuit came to this conclusion in *Maher* and the court is correct in that holding.

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[4] The tone of many of the comments of the framers and sponsors of the APA exhibit concern that full voluntary agency compliance with its provisions might not be readily forthcoming. The unusual rule against supersedure in section 12 underscores the concern. 5 U.S.C. § 559.

ARGUMENT

I. THE CIRCUITS AND THE AGENCY DISAGREE

There is no doubt that the circuits disagree. The Third Circuit here finds the true doubt rule to be incompatible with the APA, *Steadman* and *Mullins Coal*. On these authorities, the rule is invalidated. The Sixth Circuit and the Seventh Circuit find no such incompatibility and have approved the use of the rule. *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993); *Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs*, 988 F.2d 706, *reh'g denied*, 999 F.2d 291 (7th Cir. 1993). The Fourth Circuit rejects the reasoning of the Seventh Circuit, but has deferred its consideration of the validity of the rule. *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1098 n.7 (4th Cir. 1993).[5]

Even where the rule has been approved, there is little agreement on the reasoning that supports it. The only thing that has been consistent in DOL's defense of the rule is the inconsistency of the agency's arguments. Much of what is argued in the petition for certiorari is new or revisionist. Here, DOL argues variously that the APA does not apply, at least in the black lung claims, unless DOL wishes it, and then that it applies only to the degree

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[5] DOL cites several cases arising in other circuits where an ALJ's use of a true doubt rule was approved. None of these cases involved a challenge to the validity of the rule, and they are not, therefore, in conflict with the Third Circuit's opinions here. No court of appeals has disagreed with the Third Circuit's invalidation of the rule in *Maher* in a case arising under the LHWCA. Prior applications of the rule in LHWCA cases have not been tested in the face of an APA challenge.

that DOL wishes. DOL's Petition for Writ of Certiorari at 24. But if the APA applies, then it does not allocate "burdens of persuasion" and the agency is free to do so consistent with the objectives of the LHWCA or BLBA. Those objectives, of course, contemplate favoring claimants, and if the agency elects to do so by embracing a true doubt rule, its judgment deserves deference. Finally, if the APA applies, and if it obligates factfinders to find facts only if they are supported by a preponderance of the evidence, then the remedial objectives of the BLBA and LHWCA supersede the APA. *Id.*

The Seventh Circuit held that the APA "unquestionably" applies in black lung adjudications. *Freeman United*, 988 F.2d at 710 n.6. This court, however, settled on the conclusion that the APA does not assign "burdens of persuasion" and that these burdens are assigned judicially. Taking the true doubt rule as its own, the Seventh Circuit adopts it, in light of certain legislative comments, as a matter of judicial preference. *Id.* 988 F.2d at 711. Support for the approach is drawn from a footnote in this Court's decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 383, 403 n.7 (1983), two snippets of legislative history and *Mullins Coal. Freeman United*, 988 F.2d at 711-12.

The Sixth Circuit agrees with the Seventh that "the true doubt rule is a judicial construct which sprang from" the remedial purpose of the BLBA. *Skukan*, 993 F.2d at 1236-7 n.8. The Sixth Circuit recognizes, however, that DOL's regulations assign the burden of persuasion to claimants on facts not legislatively presumed, but this court apparently does not believe that the job of assigning burdens is DOL's job. *Id.* 993 F.2d at 1238.

No court has agreed with DOL's belief that the courts must defer to DOL's interpretation of its regulations to extract the rule, and no court has agreed with DOL's view that, at least in black lung cases, it is bound by the APA at the agency's option only.[6] No court of appeals has agreed with DOL's unstated but apparent belief that deference should be accorded the agency's interpretation of the APA in light of the objectives of the BLBA and LHWCA. Deference is not appropriate on this account. *See Ardestani v. INS*, 112 S. Ct. 515, 526 (1991) (Blackmun J. dissenting); *Professional Reactor Operator Society*, 939 F.2d at 1051.

The only identifiable center of gravity for DOL, the Sixth Circuit and the Seventh Circuit has two simple components. The first is that the "burden of proof" footnote in *Transportation Management*, addressing the first sentence of section 7(c) of the APA, overrules or neutralizes the holding in *Steadman* addressing the third sentence in section 7(c).[7] The second is that the remedial

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[6] DOL has argued from time to time, as it does here, that it is bound neither by the APA nor the procedural imperatives of the LHWCA. No court has agreed with DOL on these accounts, and indeed the plain language of section 19(d) of the LHWCA, 33 U.S.C. § 919(d), forbids DOL's interpretation, at least as to that provision. *See Director, Office of Workers' Compensation Programs v. Alabama By-Products Co.*, 560 F.2d 710, 718 (5th Cir. 1977); *Director, Office of Workers' Compensation Programs v. Peabody Coal Co.*, 554 F.2d 310, 341-42 (7th Cir. 1977); *see also Trent Coal Co. v. Day*, 739 F.2d 116, 117 (3d Cir. 1984); *U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 273 (5th Cir. 1979).

[7] This is quite plain. *Steadman* holds that the courts are not free, in an APA proceeding, to establish the standard for determining how much proof is needed to support a finding of fact

purpose of the BLBA allows the affirmation of a true doubt rule, because the rule favors claimants. The Third Circuit also acknowledged the remedial nature of the BLBA and LHWCA, but was unable to conclude that *Transportation Management* authorized a departure from *Steadman*, inasmuch as the two cases addressed different sentences in section 7(c) of the APA and different issues. *Maher*, 992 F.2d at 1282-83.

The on-the-record adjudication provisions of the APA apply in hundreds of different categories of proceedings conducted by many federal boards and agencies. Most of the statutes incorporating the APA carry a remedial or benevolent public purpose. The question that is presented here by DOL is whether the APA ought to give way when the agency finds it too constraining.

Two federal courts of appeals have effectively refused to follow this Court's decision in *Steadman*, and a federal agency has asked them not to do so. That surely merits this Court's attention. It is, perhaps, more important that the Department of Labor seeks to introduce a party identity based standard for evaluating proof in APA litigation, without congressional approval.[8] This is a

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because "Congress has spoken." *Steadman*, 450 U.S. at 96. The Seventh Circuit thinks Congress was silent, thus authorizing a judicial assignment of the standard. *Freeman United*, 988 F.2d at 711. The Sixth Circuit agrees, citing *Freeman*. *Skukan*, 993 F.2d at 1236.

[8] Congress could, of course, adopt a true doubt rule for black lung and longshore claims. When procedures for the adjudication of publicly funded veterans benefits claims were revised and formalized in 1988, Congress expressly adopted a true doubt rule, codifying an informal but longstanding agency

dangerous and inappropriate path to take, and it is one that was anticipated and closed by the framers of the APA in their adoption of the rule against supersedure. 5 U.S.C. § 559. This Court should step in to enforce that rule.

II. THE THIRD CIRCUIT'S DECISION IN *MAHER* IS CORRECT

There is no language in either the BLBA or LHWCA suggesting a true doubt rule. DOL's LHWCA regulations are silent on the point as are the BLBA regulations in force for claims filed prior to the repeal of the statutorily mandated presumptions. *See* 20 C.F.R. Part 727. DOL's new BLBA regulations assign claimants the "burden of proving" their cases, 20 C.F.R. § 718.403, but elsewhere under a general heading state "Congress intended that claimants be given the benefit of all reasonable doubt." *Id.* § 718.3(c). No regulation articulates a "true doubt" rule as it is described by DOL.

The Social Security Administration ("SSA"), which adjudicated all black lung claims from 1970 to 1974, employed no true doubt rule, but required claimants to prove all facts not statutorily presumed, by a traditional

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practice. 38 U.S.C. § 5107(b). DOL has not asked Congress to adopt a true doubt rule for either the BLBA or LHWCA. When the BLBA was substantially revised in 1982, to repeal most of the presumptions and rules of proof most helpful to claimants, DOL did not ask Congress to adopt a true doubt rule.

preponderance of the evidence. *Mullins Coal*, 484 U.S. at 154-55 n.27.[9]

There is no arguable source for the rule in the legislative history of the LHWCA, and DOL strains the relevant text in relying on the black lung legislative materials cited in support of the rule. DOL's Petition for Certiorari at 18-19 (*citing* S. Rep. No. 743, 92d Cong., 2d Sess. 11 (1972); S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977)). The 1972 Senate Report notes Congress's intent to resolve doubts in favor of claimants, but this comment prefaces the introduction of several new statutory presumptions and rules of proof enacted in 1972, for implementation by SSA. There was no DOL program at the time. In the next paragraph, the Committee stated: "The Committee bill gives the benefit of the doubt to claimants by [adopting the new statutory provisions]." S. Rep. No. 743, *supra*. Later in the same discussion, the Committee emphasizes that when the new statutory provisions do not apply, "[t]he Committee intends that the burden will be placed on the claimant to prove the existence of pneumoconiosis. . . . " *Id.* at 13. The 1972 passage, which is relied upon by the Sixth Circuit, the Seventh Circuit and DOL, is more naturally read to restrict SSA's authority to relax proof standards beyond what Congress wrote. SSA

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[9] SSA applies no true doubt rule or its equivalent in disability insurance adjudications. Whether or not the APA applies in SSA's disability insurance programs, the decisions in *Skukan* and *Freeman United* suggest that a true doubt rule may be applied in SSA claims as a matter of judicial preference. The Social Security Act is no less remedial than the BLBA or LHWCA.

adopted no true doubt rule. The 1977 document, in context, is no more compelling. It simply recommends the promulgation of regulations containing more liberal criteria for objective testing. S. Rep. No. 209, *supra* p. 14 at 13. DOL overlooks the legislative materials accompanying the extensive 1981 amendments under which Ondecko's case was decided. These amendments reversed course in a program perceived by Congress to be out of control, by repealing virtually all of the liberalizing provisions referred to in the 1972 and 1977 materials.[10]

DOL also takes the Court on a curious trek in seeking to create a lineage for the true doubt rule dating back to the 1930s and the early days of the LHWCA. In arguing

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[10] It bears mention also that much of DOL's discussion of the need for a true doubt rule is both misleading and disingenuous. DOL points out that black lung claimants are "sick and elderly individuals with limited resources," "who find it difficult . . . to prove that their diseases are totally disabling or coal mine related . . . ." DOL notes that clinical "tests" may be fallible "and that x-rays are imperfect means of ascertaining the existence of pneumoconiosis. . . . " *Id.* These rhetorical flourishes, if they were ever factual, have not been true for many years. Like any other federal program that transfers billions of dollars within a fairly restricted geographical area, the program has spawned its own related industries that serve the needs of claimants and employers alike. Few claimants with an arguable case will be abandoned by this system or will be unable to access it. Similarly, black lung is an exhaustively studied disease, and largely because of Congress's interest in it, x-ray and testing technologies are probably better than most. The case that is being presented to the Court here should not be influenced by the popular, but largely false, mythology often cited in black lung cases. Time has passed by these notions, and the 1981 amendments to the BLBA demonstrate congressional awareness of the current reality.

the case to the courts of appeals, DOL traced the rule to a 1978 Benefits Review Board decision in a black lung case. *Provance v. United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483, 1-486 (Ben. Rev. Bd. 1978). There is no articulation of a true doubt rule predating this decision, and none of the earlier LHWCA cases cited by DOL holds that employers must bear a "burden of persuasion" on all factual issues presented in a claim. For the most part, the earlier references to doubt resolving are judicial embellishments in cases where the adjudicator's findings are being sustained because they are supported by substantial evidence. *See e.g., Southern S.S. Co. v. Norton*, 101 F.2d 825, 827 (3d Cir. 1939); *Southern Pac. Co. v. Sheppard*, 112 F.2d 147, 148 (5th Cir. 1940).

The LHWCA cases cited for historical context focus generally on the presumption of occupational causation contained in section 20(a) of the LHWCA, 33 U.S.C. § 920(a), and virtually all of them predate the 1972 incorporation of the APA into the LHWCA. Pub. L. No. 92-576 § 14, 86 Stat. 1261 (1972). Section 20(a) of the LHWCA presumes that an injury or disease is occupationally related, but it shifts no ultimate burdens to employers. It is a bursting bubble rule that "falls out of the case" when contrary probative evidence is offered. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). This Court has previously rejected the theory that section 20(a) shifts ultimate burdens, and the opinion in the case fairly clearly precludes a section 20(a) based true doubt rule, as the rule is described by DOL. *U.S. Industries v. Director, Office of Workers' Compensation Programs*, 455 U.S. 608, 613-15 & n.7 (*quoting* 3A Larson, *The Law of Workmen's Compensation* § 78.10 at 15-2 (1976)).

It appears, in fact, that the ALJ in *Maher* layered a true doubt rule on top of section 20(a) because section 20(a) was not adequate to establish the claim. DOL defends this enhancement of the statutory rule, notwithstanding *Del Vecchio*, because of the independent viability of the true doubt rule. DOL's Petition for Writ of Certiorari at 10. This Court has often reminded the agency that the LHWCA may not be expanded beyond its terms on the pretext of boundless liberality. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992); *Morrison-Knudtsen Constr. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 635-36 (1983); *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 282 & n.24 (1980).

No operational true doubt rule predates the Board's 1978 decision, and even after it was announced the rule was infrequently used in BLBA or LHWCA cases until fairly recently. DOL's attempt to provide a noble vintage for the rule is not accurate. For the most part, DOL's reasoning, and in particular, its deference claim are 1993 developments originating in this litigation. Were this a case in which the Court might be inclined to defer to the agency, and this should not be such a case, this Court would be deferring to a litigation-bred argument post-dating by thirteen years, the regulations being interpreted. DOL's deference claim is tenuous in this environment. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-13 (1991).

B. The solution to the questions presented here is not found in the remote sources and revisionist history presented by DOL, but in the plain language of the APA, its history and *Steadman*. Neither the BLBA nor the

LHWCA contains anything remotely resembling a true doubt rule. Both statutes, however, make the APA on-the-record adjudication provisions applicable "[n]otwithstanding any other provisions of this Act . . . . " 33 U.S.C. § 919(d). The APA prescribes standards of proof for the agency adjudications in which it applies. One of those standards is that ALJs needing to find facts may find them if they are supported by a congressionally determined "minimum quantity of the evidence." *Steadman*, 450 U.S. at 100. The minimum quantity of evidence that is acceptable to support a finding of fact in an APA proceeding is a preponderance. *Id.* at 100-104; *see also* H.R. Rep. No. 1980, 79th Cong., 1st Sess. 37 (1945). Where evidence is in conflict or "equally supports two inconsistent inferences," the evidence falls short of a preponderance and no fact is established. *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 33, 39 (1933).

The third sentence of section 7(c) of the APA instructs the factfinder that "[a] sanction may not be imposed or rule or order issued" unless the APA proof standards are satisfied. Where evidence relating to a fact needed to support a rule, order or sanction[11] is no stronger or more persuasive than evidence to the contrary, no fact is proven and under the APA no fact may be found. *See e.g., NLRB v. Patrick Plaza Dodge, Inc.*, 522 F.2d 804, 809 (4th Cir. 1975).

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[11] The APA defines "sanction" to include "the whole or any part" of an agency's assessment of damages or compensation. 5 U.S.C. § 551(10)(E).

Section 12 of the APA provides, *inter alia*:

> Subsequent statutes may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly. . . .

5 U.S.C. § 559.

Supersedure is narrowly construed and it must be statutory. *Brownell v. We Shun*, 352 U.S. 180, 185 (1956); *Marcello v. Bonds*, 349 U.S. 302, 310 (1958); *Professional Reactor Operator Society*, 939 F.2d at 1052; *Attorney General's Manual on the Administrative Procedure Act* 75 (1947).

DOL has made no appropriate case for supersedure and seeks to escape section 12 mostly by reading any meaning out of the third sentence of section 7(c) and ignoring this Court's interpretation of it in *Steadman*. DOL's argument is that the ALJ does not look only at the proof when it is being weighed, but rather looks to see who the parties are before getting on with the job. Ambiguities in the proof are then resolved not based upon the strength and persuasion of the proof alone, but in the final analysis, on the identity of the party the proof favors. It seems quite clear that this is not what the authors and proponents of the APA had in mind. *See Legislative History, supra* p. 7 Foreward (1946).

DOL's discussion of shifting burdens, burdens of persuasion, and *Transportation Management* diverts attention from the central issues that are presented here. It is surely true that standards of proof and burdens of proof are related elements in the course of decisionmaking in APA matters as well as all other kinds of litigation. It is also true that the terminology and operation of these rules of

proof may become confusing, and if there has been anything consistent in DOL's arguments in support of the true doubt rule, it is in the agency's efforts to exploit this confusion.

The confusion is not, however, too difficult to dispel. The preponderance-of-the-evidence standard, as it is described in section 7(c) of the APA and *Steadman*, embodies a simple instruction. The instruction is that facts ultimately found must be supported by evidence that is at least slightly better than contrary evidence. DOL seeks to use the burden of proof language in the first sentence of section 7(c) to diminish the meaning intended in the third sentence. It may be that the APA does not assign ultimate burdens of persuasion, but the APA clearly does establish a fact finding standard. It does not do violence to any part of section 7(c) to effectuate the meaning of the third sentence and let the burdens fall where they may for all the parties to any proceeding. This reading harmonizes *Steadman* and *Transportation Management*, and accords with the intent of the APA's framers that section 7(c) operate as a whole. *Legislative History*, *supra* p. 7 at 216, 302.

> The first and second sentence of the section [7(c)], therefore mean that where a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case, an agency must decide "in accordance with the evidence." Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance.

Id. at 270-71.

DOL argues for a reading that creates irreconcilable tension between the first and third sentences of section 7(c). DOL's reasoning is wrong on that account alone. The Third Circuit was correct in its reading of the relevant language.

III. THIS IS AN IMPORTANT CASE

DOL argues that the case is important because it may affect future BLBA and LHWCA claims, and indeed that is true. For the private litigants here, it is important for another reason. The comprehensive standards for administrative adjudication in the APA protect private litigants, not only in BLBA and LHWCA matters, but in many other matters of importance as well, from the attempts of agencies to re-design basic adjudicatory procedures indirectly to advance their policy objectives. The APA was designed to ensure a level playing field when litigants enter an ALJ's courtroom. 5 U.S.C. § 559. The APA maximizes the independence of the adjudicator and guarantees the fairness of the basic rules insulating both from the ebb and flow of agency policies and politics. Agencies have no great affection for the APA because it is a restraint. Researchers have attributed the phenomenal growth in the number of federal non-APA judges and relative stagnation in the growth in the size of the ALJ corps, at least in part, to agency dissatisfaction with the independence of APA adjudicators and the inviolability of APA rules. *See generally*, Verkuil, *et al.*, *Administrative Conference of the United States, The Federal Administrative Judiciary* (1992).

DOL may convince Congress to free it from the APA or expressly to enact a true doubt rule. Until that time, this Court should enforce the APA according to its terms.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted for the purpose of affirming the Third Circuit's holdings in these cases.

Respectfully submitted,

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